Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM 1997

VERN ODELL CRAWFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

The Fourth Circuit Court of Appeals has decided in this case that a United States District Court is not required, sua sponte, to give the jury a credibility instruction on the status of a paid government informant, and by not giving such an instruction does not constitute plain error. Is that finding in conflict with the Tenth Circuit Court of Appeals holding that such a instruction, sua sponte, is absolutely required, and constitutes plain error if omitted?

Did the Fourth Circuit Court of Appeals commit reversible error when they held that under the Jencks Act that a 15 (fifteen) minute continuance to review 92 (ninety-two) pages of informant material was sufficient and further that any prejudice could be cured by recalling the informant as an adverse witness the next day of trial?

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Vern Odell Crawford,
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Petition for Writ of Certiorari to the
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Vern Odell Crawford, respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is set out in the Appendix, *infra*, 1a to 13a. That opinion affirmed the decision of the U.S. District Court of the Western District of Virginia, Harrisonburg Division, which is set out in the Appendix, *infra*, 14a.

JURISDICTION

This case in the U.S. District Court for the Western District of Virginia, Harrisonburg Division, under 18 U.S.C. 1503, 26 U.S.C. Section 7203, in which the court had jurisdiction under 18 U.S.C. Section 3231 for offenses against the laws of the United States.

STATEMENT OF THE CASE

Vern Odell Crawford, the Appellant, is a self-employed businessman and long-time resident of Elkton, Virginia. (JA., Vol. IV, p. 893). On September 21, 1995, a federal Grand Jury in Roanoke, Virginia indicted the Appellant on two charges of Failure to File a Federal Tax Return (26 U.S.C. Section 7203) and Obstruction of Justice (18 U.S.C. Sections 1503 and 2). (JA., Vol. IV, p.885). The Appellant was tried on these charges before the United States District Court for the Western District of Virginia with the Honorable Jackson L. Kiser presiding. After a three day trial on April 23-25, 1996, the jury found Mr. Crawford guilty on all three counts. (JA., Vol. I, p. 399, L. 19-24). He was subsequently released on bail until his sentencing hearing on October 3, 1996. Judge Kiser sentenced Mr. Crawford to 51 months imprisonment (JA., Vol. II, p.590, L.5-10) and fined him $100,000.00 (JA., Vol. II, p. 591, L. 19-23), plus costs of prosecution of $5,934.65 (JA., Vol. II, p. 596, L.3-6). The final sentencing order was entered on October 10, 1996. (JA., Vol.II, p. 598-604). This U.S. District Court and the Fourth Circuit Court of Appeals, after sentencing the Appellant, subsequently denied the Appellant's Motion for Stay of Execution of Sentence and Motion for Bail Pending Appeal. The Appellant is currently imprisoned in the Federal

prision at Lexington, Kentucky.

ANALYSIS

Question 1:

The Petitioner claims that the Fourth Circuit Court of Appeals failed to recognize plain error committed by the United States District Court in not informing the jury, *sua sponte*, through an instruction that a government's chief and material key witness, Patricia Gail Littleton, was, in fact, a paid informant. Neither the defense nor the prosecution offered the instruction. The Tenth Circuit Court of Appeals in United States v. Miller, 499 F.2d 736 (10th Cir. 1974) stated that a cautionary instruction is **required** for an informant case when the individual supplying information is paid, as in the instant case. Miller, at 742. Devitt and Blackman's Jury Practice and Instructions (3rd ed. 1977) has adopted the principle from Miller and provided the following instruction in Section 17.02:

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage of vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant.

Moreover, where the Government's case rests primarily on the testimony of informers, as it did in this case, reversible error will lie if this instruction is not given. See United States v. Swiderski, 539 F.2d 854 (2nd Cir. 1976). In the instant case, the Government's conviction of the

Appellant for the charge of obstruction of justice depended solely on the testimony of Patricia Gail Littleton, the Government's paid informant.

The Fourth Circuit Court of Appeals considered the principle enunciated by Miller, supra, in United States v. Brooks v. Johnson, 928 F.2d 1403 (4th Cir. 1991) and declined to find error since the witness characterized as an informer, failed to fulfill criteria for informer, i.e., he was neither paid, promised immunity for his testimony, nor did he seek personal advantage or vindication thereby. Brooks, at 1409. However, Brooks did confirm the principle from Miller is applicable in the Fourth Circuit, i.e., a cautionary instruction is appropriate where an individual supplying information is a paid informant for the Government seeking a conviction in a criminal case. Moreover, failure to give such cautionary instruction is an abuse of discretion when the witness was, in fact, paid and/or received other consideration, i.e. being allowed to escape prosecution for tax evasion, as in the instant case. Brooks, at 1403.

The Fourth Circuit Court Of Appeals, in its holding in this case, relied on decisions from United States v. Bosch, 914 F.2d 1239, 1247-48 (9th Cir. 1990) (finding that the failure to give a paid informant instruction, *sua sponte*, is not plain error) and United States v. Cook, 102 F.3d 249,252 (7th Cir. 1996) (stating that decision of whether to give such an instruction, even in the face of a request from counsel, is discretionary with the trial judge). It is apparently clear that there is a clear conflict with the holdings in Bosch and Cook in comparison with the holding in Miller. The Tenth Circuit Court of Appeals requires that the lack of instruction to the jury, *sua sponte*, will constitute plain error, as opposed to the holdings in Bosch and Cook that hold such instruction is

discretionary, even upon request by either counsel.

The Fourth Circuit Court of Appeals has adopted the position held in Bosch and Cook and completely discarded the holding in Miller. In doing so, this has greatly impeded the rights of the petitioner to due process in violation of the 14th Amendment to the U.S. Constitution and the Privileges and Immunities clause of Article IV section II of the U.S. Constitution by denying him a new trial on the basis of plain error.

Question 2:

The Fourth Circuit Court of Appeals has additionally failed to recognize the petitioners rights to due process and rights created under this Honorable Court's holding in Brady v. Maryland, 83 S.Ct. 1194 (1963) and under the Jencks Act.

When Patricia Gail Littleton, the government's paid informant, took the stand at the Appellant's trial, the prosecution provided the Appellant's counsel, Frank Mika, with ninety-two (92) pages of reports documenting Littleton's clandestine meetings with the police while operating as a paid informant. The Government did not produce these materials in compliance with discovery claiming their exemption therefrom under 18 U.S.C. § 3500(a) (Jencks Act). Appellant's trial counsel, Mr. Mika, immediately made objections by making an oral motion for mistrial based on the government's failure to comply with discovery and to reveal exculpatory material or have her testimony stricken and that she be excluded from testifying (i.e., violation of Brady). The trial judge denied the Motion and, in lieu thereof, granted a continuance for a mere fifteen (15) minutes to afford the Appellant's counsel an opportunity to read and digest the

ninety-two pages of material of the utmost importance to the Appellant's defense. Mr. Mika, in his affidavit, asserts the obvious fact that fifteen (15) minutes was totally insufficient to adequately review the material and prepare therefrom for an effective cross-examination and defense strategy (See Affidavit in Appendix).

The Jencks Act, 18 U.S.C. § 3500 states, in part:

> "Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion...may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial. (Emphasis added).

In essence, trial counsel was given less than ten (10) seconds per page to read, digest and analyze the Jencks materials and formulate a cross-examination therefrom as well as a defense strategy to negate this explosive, prejudicial, and inflammatory material. One could hardly consider this reasonable or fair under our system of American justice. In United States v. Holmes v. Aument v. Aument, 722 F.2d 37 (4th Cir. 1983), defense counsel was provided a stack of Jencks material eight inches thick on the morning of the day before the trial. In vacating a judgment of conviction and granting a new trial, the Holmes court ruled that the district (trial) court abused its discretion and denied the defendant's rights under the Jencks Act.

In the Holmes case, the defense had roughly twenty-four (24) hours to review approximately two thousand (2,000) pages which amounted to forty-three (43) seconds per page. If the Fourth Circuit Court of Appeals found in Holmes that the defendants were not afforded a reasonable opportunity to examine and digest the mass of material furnished them on the day before the trial, then certainly, with only ten (10) seconds per page, one quarter as much time, the Appellant in the instant case was denied his rights. Since the Fourth Circuit Court of Appeals held in Holmes that the District Court had abused its discretion in failing to grant a reasonable delay in the progress of the trial to permit counsel to complete their studies and preparation (of the Jencks material) and granted Appellant a new trial, the District Court in the instant case has, a fortiori, abused its discretion and the Appellant should likewise be granted a new trial. Id. at 41.(Emphasis Added).

The Fourth Circuit Court of Appeals held that petitioner did not make a contemporaneous objection that the fifteen minute recess was insufficient to allow proper review of the material. Because of the failure to object, the court reviewed the matter as plain error and found that none existed. The Fourth Circuit Court of Appeals committed error by stating that defendant failed to object to not being given sufficient time to review the Jencks materials, however, the Court failed to recognize that Mr. Mika did object not once but twice and was overruled on both objections (motion to exclude the witness and motion to declare a mistrial) (see Appendix.). To continue to object for a continuance or

adjournment would have been fruitless. This issue was preserved for appeal purposes. The Fourth Circuit Court of Appeals failed to follow their own holding in Holmes and, in fact, failed to even address the Holmes case in relation to the instant case.

Another fact that is critical to the analysis here is that the Assistant United States Attorney advised to the defense attorney that there was no informant when in fact there was an informant. This is patently unfair and prejudicial to the trial process to condone such conduct by the Government to the defense attorney, then have the defense rely on those false representations and get surprised at trial by ambush. See U.S. v. Kelly, 35 F.3d 929 (4th Cir. 1994).

The Fourth Circuit Court of Appeals has now caused an inconsistency in the proper interpretation of the Jencks Act. In Holmes the Court held that 24 (twenty-four) hours was not sufficient time to review 2,000 pages of documents, but that 15 (fifteen) minutes is sufficient time to review 92 pages of documents. If the Court had applied its holding in Holmes, then even if the defense had been given 66 (sixty-six) minutes to review the material, that would not be an adequate amount of time to review the material. Clearly, the Fourth Circuit Court of Appeals has now created an inconsistent ruling within the Courts own holdings, and has unduly prejudiced the petitioner.

CONCLUSION

The Fourth Circuit Court of Appeals ruling in this case on the issue of *sua sponte* jury instructions on paid government informants is in clear conflict with the holding from the Tenth Circuit Court of Appeals. Additionally, the

Fourth Circuit Court of Appeals has unduly prejudiced the petitioner by not applying its own holding in Holmes to the issue of adequate time to review new materials entered into a trial under the Jencks Act. Since the Fourth Circuit Court of Appeals has created inconsistencies that have greatly affected the petitioner by denying him a new trial, this Court should use its supervisory capacity to correct the Fourth Circuit Court of Appeals. This court should overrule the decisions of the trial and appeals court and remand this case to the trial court with an order for a new trial.

RESPECTFULLY SUBMITTED

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